Testimony re HB187
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EXHIBIT 3
DATE 1/17/13
HB 187

I have been licensed as an outfitter for 29 years and served on the Board of Outfitters for 6 years during the 90's, acting as chairman for 4 years. I am affected by this proposed legislation and have concerns about the bill as drafted.

For years, outfitter's have expressed the need to stop unlicensed practice - that is, keeping people without licenses from serving the public as either guides or outfitters. Yet, today, this committee is being asked by some outfitters to authorize unlicensed practice within an emergency framework. I ask that you deliberate carefully on HB187 and review a series of amendments I will offer that may simplify your consideration.

I understand and sympathize with outfitter's need for replacement help in an emergency, especially those that occur in a virtual communications blackout in the back country or on remote waters. In fact, while serving on the Board of Outfitters, I helped develop an 'Emergency Guide' rule.

Unfortunately, that rule was recently deemed illegal by Dept. of Labor & Industry counsel because it did not include the mandatory vetting of all applicants for a license in our profession. This vetting is required of license applicants for any profession and is intended to reveal prior violations or past disciplinary actions in Montana or elsewhere that could interfere with public safety or welfare and may render the applicant unfit for licensing. By granting unlicensed status to an outfitter's assistant, or OA, you remove that vetting requirement, as well as a basic first aid training requirement for guides, thereby reducing public protection. More about this vetting in a minute.

I see HB187 as balancing a hopefully rare but immediate outfitter need with public safety. We should all work together to reduce public exposure to potential harm in the absence of licensee vetting and reduce the hiring outfitter's exposure for using an un-vetted OA in the field. In fact, the bill is already doing this by limiting the OA infield service to 15 days.

But we can do more. I propose 5 amendments to that end:

1) Include in law the express responsibility of an outfitter who hires and uses an outfitter assistant. While the bill as drafted contains some responsibility language in Section 7, the language includes for "penalties provided in this chapter" and "under the laws and regulations", ie. Title 37-47, outfitter law, which does not have jurisdiction over unlicensed persons, except for cease and desist actions against unlicensed practice.

I believe the model for the unlicensed OA is an unlicensed medical assistant. Law and rule for a medical assistant reduce public exposure to potential harm by setting guidelines for a physician's use of an unlicensed MA. One of these is 37-3-104(3), MCA, which "holds the supervising physician . . . responsible . . . for any acts of or omissions by the medical assistant acting in the ordinary course and scope of the assigned duties." Such accountability is part of all standard licensing guidelines, but should be emphasized in this use of an unlicensed OA.

2) Require the outfitter supplying an O.A. to inform any client(s) served that they are being guided by an unlicensed O.A. replacing a licensed guide in an emergency situation. This leaves the decision to continue or not up to the client, reducing the exposure of the hiring outfitter similar to a client signing an acknowledgment of risk statement. Again, this amendment parallels rules regarding medical assistants at ARM 24.156.640(5): "The supervising physician or podiatrist's office shall ensure that patients are informed when a medical assistant is seeing them . . . "

3) In line 15, change "more than 15 days" to "more than 15 successive days" to eliminate repeated use of an OA on separate occasions up to a total of 15 days. 15 successive days should be enough time to overcome even a back-country emergency replacement situation. This should be an emergency guide replacement, not a convenient unlicensed stand-in to be used in non-emergency situations.

4) OA's can not be used for more than 15 successive days without extension, regardless of applying for a guide license. Why? Remember, the original "Emergency Guide" rule was overturned due to lack of mandatory vetting. That vetting process includes two paths to licensing:

1) If a license applicant answers "No" to a question about having any prior violations or past licensing disciplinary actions, the application is deemed "routine" and a license is typically issued within a

week.

2) If any license applicant confirms they have prior violations or past disciplinary actions elsewhere, the application is deemed "non-routine" and must be reviewed by the full board at the next scheduled board meeting. Since the Board of Outfitters meets approximately every quarter, an OA with a non-routine license application could stay in the field up to 90 days beyond the standard 15 days allowed in the bill.

Separate the normal guide licensing process, including mandatory vetting, from the emergency replacement situation, particularly in back-country situations where a new guide license application requiring extensive paperwork may not be immediately available.

5) Since this is an emergency replacement, **limit the use of an OA to one per outfitter per year**. Again, 15 days is enough to handle an emergency. And, in my experience in the field and with the board, I recall only one circumstance that required repeated or continued use of a 'emergency guide' - that was during the fires of the mid-90's, when many guides chose to work on the firelines instead of remaining available to serve outfitter's clients. I'm sure the board could craft a rule to extend OA use in the rare event of such a state or federal emergency.

Taken together, these amendments set clear guidelines that reduce public exposure to potential harm by defining accountability for the outfitter, allowing client participation if the decision to use an OA, and limiting the time an unlicensed, unvetted OA may serve in the field. Informing the client and limiting the time an OA may serve also reduces the hiring outfitter's liability exposure.

As for the fiscal note, I believe assumption #2 is near-sighted and possibly naive. Yes, the board will have to develop rules regarding documentation standards for proof of employment. This is no small task in itself, considering that such documentation will have to be distributed to outfitters long before they head out to the back country or remote waters, and will have to somehow demonstrate a definitive starting and finishing time for the 15 successive days, as well as how far into the 15-day period an OA is when encountered by law enforcement.

But, if OA's are to be administered by the board (within the Dept. of Labor & Industry) as equivalents to licensed guides, all current rules pertaining to guides will have to be adjusted to include OA's. In addition, many Dept. of Fish, Wildlife & Parks rules pertain to guides and will have to be changed as well. For example, special commercial use permits for fishing outfitters and their guides on restricted waters include provisions for display of specific tags or decals. OA's will have to be added to these rules.

In short, the assumed fiscal impacts are greater than the cost of a rule focused on one aspect of OA administration, not to mention the cascade of rule changes for OA's withing DLI and FWP. I argue that perhaps the benefits contemplated in HB187 may be had at a cost to all licensees exceeding the board's current spending authority, and that of FWP as well.

In any case, carefully consider your role in authorizing unlicensed practice responsibly to help outfitters who may face emergency situations. Make sure you limit potential harm to Montanans and the non-residents served by our licensed outfitters, while preserving the integrity and accountability of our profession and keeping the fiscal impact well within the board's budget and appropriation restraints.